Supreme Court, U.S.
FILED

96 169 JUL 29 1996.

OFFICE OF THE CLERK

No. 96-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

ROCIO ANDRADE and JACKIE ROXANNE MARQUEZ,

Petitioners,

vs.

CITY OF BURLINGAME, ALFRED PALMER, and RICHARD HARMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
ATTORNEYS FOR PETITIONERS
3435 Wilshire Boulevard, Ste. 2900
Los Angeles, CA 90010
(213) 252-9444

QUESTIONS PRESENTED

1. Under this Court's decision in *Brower v. County of Inyo*, 489 U.S. 593 (1989), has a municipality "seized" a person within the meaning of the Fourth Amendment where the seizure consists of a police dog attacking a person without command to do so but pursuant to police department-approved training that trained the dog to attack on its own without any command from its handler?

2. Is the fact that an officer acted with good intentions, *i.e.*, the officer did not intend that the dog attack two helpless school girls, relevant, under *Graham v. Connor*, 490 u.S. 386 (1989), in determining whether the officer committed a Fourth Amendment seizure?

3. Where a person is in police custody and a police dog then attacks that person pursuant to the department's training that the dog should attack and bite upon the dog's determination that an attack is necessary, is the attack actionable under the due process clause for an alleged violation of a person's liberty interest?

LIST OF PARTIES

Petitioners Jackie Marquez and Rocio Andrade were plaintiffs and appellants in the courts below. Respondents City of Burlingame, Burlingame Police Chief Alfred Palmer, and Burlingame police officer Richard Harman were the defendants and appellees in the courts below. Miguel A. Andrade was a plaintiff who did not appeal.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Proceedings Below 3
B. Statement Of Facts 4

REASONS FOR GRANTING THE WRIT 6

1. The Court Should Grant Review To Decide Whether A Municipality Which Trains a Dog To Attack And Injure Persons Upon The *Dog's* Determination That An Attack Is Necessary, Has Committed An Intentional Seizure Within The Meaning Of *Brower v. County of Inyo.* 6

2. The Lower Courts' Dispositions Are Inconsistent With This Court's Decision In *Graham v. Connor.* 9

3. This Court Should Grant Review To Decide The Extent Of Municipal Liability Under The "Danger Creation" Exception Recognized By This Court In *DeShaney v. Winnebago County, Dep't of Soc. Servs.* 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases:

Andrade v. City of Burlingame,
847 F. Supp. 760 (N.D. Cal. 1994) 1, 3, 9

Brower v. County of Inyo,
489 U.S. 593 (1989) . . . . . i, 5-8

Brower v. County of Inyo,
817 F.2d 540 (9th Cir. 1987) 8

Chew v. Gates,
27 F.3d 1432 (9th Cir. 1994) 8

DeShaney v. Winnebago County, Dep't of Soc. Servs.,
489 U.S. 189 (1989) 11

Garner v. Memphis Police Dept.,
8 F.3d 358 (6th Cir. 1993) 10

Graham v. Connor,
490 U.S. 386 (1989) . . . . . i, 10

Horton v. Flenory,
889 F.2d 454 (3rd Cir. 1989) 13

L.W. v. Grubbs,
974 F.2d 119 (9th Cir. 1992) 6, 11, 13

Constitutions, Statutes, Rules:

Title 42, U.S.C. § 1983 ..... 3, 7, 13

U.S. Const., Amend. IV 7, 8, 11

U.S. Const., Amend. XIV 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

ROCIO ANDRADE and JACKIE ROXANNE MARQUEZ,

Petitioners,

vs.

CITY OF BURLINGAME, etc., et al.,

Respondents.

Petitioners Rocio Andrade and Jackie Marquez respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on March 13, 1996.

OPINIONS BELOW

The decision of the court of appeals was not reported. It appears in the Appendix hereto [hereinafter "Apx."], Appendix A. The decision by the District Court for the Northern District of California was reported, see *Andrade v. City of Burlingame*, 847 F. Supp. 760 (N.D. Cal. 1994). A copy appears as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on March 13, 1996. Apx. A-1. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on April 30, 1996. Apx. B-1. This petition for certiorari was filed July 29, 1996, 90 days within April 30, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Proceedings Below

Plaintiffs Jackie Marquez and Rocio Andrade sued defendants City of Burlingame, Alfred Palmer, its chief of police, and Burlingame police officer Richard Harman, alleging violations of 42 U.S.C. § 1983.[1] Defendants moved for summary judgment which was granted. *Andrade v. City of Burlingame*, 847 F. Supp. 760 (N.D. Cal. 1994). Plaintiffs appealed and the Ninth Circuit affirmed. Apx. A-1 through A-5.

---

[1] Additional plaintiffs were Miguel Andrade and Maribel Andrade. The trial court dismissed their claims and they did not appeal.

B. Statement Of Facts

The facts are simple. Burlingame police officer and police dog handler Harman stops a carload of teenage school children believing they were suspects in a beating that had just occurred. At gunpoint, he orders everyone out the car. Fifteen year old Jackie Marquez and sixteen year old Rocio Andrade comply. They get on the ground as ordered. Without Harman's knowledge or command, his police dog comes out of the police car and attacks both girls *in the head.* Apx. C-2, C-3 (district court opinion).

Although it was undisputed that Harman did not order the dog to attack and was unaware the dog had left the police car until after Harman heard the school girls' screams, the dog attack was consistent with and pursuant to Burlingame's training. In justifying the dog attack, Harman stated that the dog "felt that the five suspects were threatening me and were possibly going to assault me" (AER 23 [Harman's police report]). Harman further testified "the *dog is trained to react on his own* if there is a threat of violence to me" which, in this case, meant "the noncompliance" plaintiffs allegedly displayed (AER 68:4-9 [Harman's deposition]). According to Harman, based upon its training,

> [T]he dog, itself, can decide, based upon its own perception without any command [from me], to attack and bite someone . . .
> AER 70:2-5 [Harman deposition].

Varney, the dog's trainer and Sgt. O'Brien, Harman's supervisor, were equally explicit. The dog attacked consistent with its training because "the actions of the passengers were of such to indicate to [the dog] that it was a dangerous situation, potentially hostile." AER 169:14-17 [Varney's deposition testimony]. According to O'Brien, these dog attacks occurred because

Burlingame *expects* the dog to attack on its own "when the conditions prevail[] that the officer was in threat of being assaulted." AER 161:15-19 [O'Brien's deposition testimony]. Furthermore, Sgt. O'Brien found the dog attacks justified under department policy -- O'Brien did *not* order any evaluation of either Harman or the dog as a result of the incident, AER 161:20-25, because *both* Harman *and* the dog "follow[ed] proper procedures" and acted "appropriate[ly]." AER 162:25-163:11 [Harman's deposition testimony]. *See also* Apx. C-14, C-15 (district court states "[t]here is some evidence that Officer Harman's dog had been trained to act on its own, without orders from the officer, in certain situations in which it perceived danger to the officer.").

District Court Opinion

In a published decision, the trial court granted defendants' summary judgment motion. On petitioners' claim that the dog attack violated the Fourth Amendment, the court concluded no violation occurred because there was no *seizure* as defined by this Court's opinion in *Brower v. County of Inyo*, 489 U.S. 593 (1989). Apx. C-7, C-8, C-9. As the trial court framed the issue,

> The key question is whether *Officer Harman* intended to seize plaintiffs by means of the dog and the answer is indisputably "no."
> Apx. C-9 (emphasis in original).

Thus, the trial court could ignore the evidence which it acknowledged showed that "Harman's dog had been trained to act on its own, without orders from the officer, in certain situations in which it perceived danger to the officer." Apx. C-14, C-15.

On petitioners' claims for violations of their substantive due process rights, the district court concluded it was identical to

the Fourth Amendment violation and therefore must fail for the same reasons. Apx. C-17, C-18, C-19.

Ninth Circuit Decision

In a very brief discussion, the Ninth Circuit panel stated that Burlingame's training was insufficient to constitute a Fourth Amendment seizure because there was no evidence that Harman "consciously chose to employ the dog[]" as a means of subduing petitioners. Apx. A-3. On the Fourteenth Amendment claim, the panel concluded it too must fail since there was no showing of a Fourth Amendment violation. Apx. A-4. There was no discussion on petitioners' claim that the dog attack was actionable under a danger-creation theory, e.g., *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992).

REASONS FOR GRANTING THE WRIT

1. The Court Should Grant Review To Decide Whether A Municipality Which Trains a Dog To Attack And Injure Persons Upon The *Dog's* Determination That An Attack Is Necessary, Has Committed An Intentional Seizure Within The Meaning Of *Brower v. County of Inyo*.

The problem this case raises is what constitutes "intent" in the context of an instrumentality which is animate and can act pursuant to training. The Ninth Circuit panel, as did the district judge, treated the dog attack as if the dog was just like an *in*animate object, *e.g.*, a baton. Since no officer intended that the dog attack and, in fact, probably would not have wanted the dog to attack these school girls, the attacks were not intentional seizures. At least when it comes to a police instrumentality that can act on its own, petitioners submit that it is sufficient, under

Brower v. County of Inyo, 489 U.S. 593 (1989), that the police instrumentality accomplish its objective through the training the department knowingly provides. This is consistent with *Brower*. There, the police had set up a roadblock to stop a suspect's high speed vehicle flight. The key fact, in this Court's holding that the police had "seized" the suspect, was that the roadblock was put in place in order to stop the suspect's flight, *i.e.*, should the suspect persist in fleeing, his car would crash into the roadblock, thereby terminating his flight. 489 U.S. at 598-99.

The dog attack on petitioners satisfies *Brower's* requirement of "an intentional acquisition of physical control." 489 U.S. at 596. Respondents conceded that the dog, in leaving the car and attacking petitioners, acted as trained. This was asserted not only by Harman, the dog's handler, but by his supervisor O'Brien and the dog's trainer Varney. No one claimed that the attack was an accident. No one claimed that the dog failed to abide by its training. To the contrary, the supervisor O'Brien found that both Harman and the dog acted appropriately under department policy. By training a police dog to act on its own and attack a person whom the dog decides is threatening its handler, the City of Burlingame cannot credibly claim it did not intend that the dog attack petitioners.

The lower courts' conclusions that *Harman's* intent was a prerequisite to a finding of a Fourth Amendment seizure is not supported by *Brower*. Furthermore, the conclusion is contrary to *Brower* and undermines the remedial purposes of 42 U.S.C. § 1983.

For purposes of determining if there was a Fourth Amendment seizure, that Harman did not intend the dog attack is

not dispositive.[2] Nowhere in *Brower* did this Court indicate it was the intent of Deputy Oyster, the officer who was pursuing Brower's decedent,[3] that determined if a seizure occurred. *Brower* frames the inquiry more broadly: "Violation of the Fourth Amendment requires an intentional acquisition of physical control." 489 U.S. at 596. "We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id.*, at 599. Thus, the question is *not*, did Officer Harman intend that the dog attack; the question is, did *any* defendant intend that the dog attack? Clearly, Burlingame did -- the city trained the dog to act on its own and attack persons like plaintiffs under circumstances of their detention. Harman and O'Brien admitted as much. In other words, since the dog attacked petitioners because that was how the dog was trained, petitioners were "stopped by the very instrumentality [the dog] set in motion [through training] in order to achieve that result [the dog attack]." 489 U.S. at 599. Burlingame's training does not depend upon Harman's intent because it operates independent of Harman's intent.

By affirming the published decision of the lower court, the Ninth Circuit has upheld a dangerous precedent. In finding it insufficient, for Fourth Amendment purposes, that the dog had been trained to act and bite on own, the district court held "[t]he dog is

---

[2] Of course, the fact that Harman did not order the dog to attack is a factor that might cut in *his* favor. A jury might conclude that Harman's actions did not proximately cause the attack since the fault for the attack lay with defective training, e.g., *Chew v. Gates*, 27 F.3d 1432, 1445 (9th Cir. 1994). That, however, is a different question.

[3] Oyster was chasing the decedent and during the pursuit radioed ahead to establish a roadblock. *Brower v. County of Inyo*, 817 F.2d 540, 542 (9th Cir. 1987), *reversed* 489 U.S. 593 (1989).

not a defendant in this suit nor could it be." *Andrade v. City of Burlingame*, 847 F. Supp. 760, 764 (N.D. Cal. 1994). Of course the dog is not and can never be a defendant. However, *unlike* every other police weapon or device, a dog is an animate being. Because it is an animal, it can take independent action. Whereas a baton, a gun, or a patrol car requires a human counterpart, the dog does not. Burlingame not only knows this; the city exploited it. It trained the dog to act on its own. The dog then followed that training. And, as shown by Sgt. O'Brien conclusion that both the dog and its handler "follow[ed] proper procedures" and acted "appropriate[ly]," Burlingame approves it.

The lower court's decision and the Ninth Circuit's affirmance, sends the wrong message. Now police departments can do what Burlingame did. Recklessly train dogs to take action under circumstances that require *human* judgment. The department need not worry about cases like this one, *i.e.*, a case where no human being would, afterwards, credibly argue that the dog attack was appropriate. The department can instead point the finger at the dog. After all, "[t]he dog is not a defendant."

2. The Lower Courts' Dispositions Are Inconsistent With This Court's Decision In *Graham v. Connor*.

Perhaps underlying the lower courts' disposition was the belief that the officer acted with "good intentions." Harman could not possibly have wanted this dog to attack two school girls; they would only want the dog to attack real criminals, *e.g.*, burglars, etc.

Defendants' denials of bad intentions, *i.e.*, "I did not want the dog to attack and bite these girls," or defendants' apparent good faith in training the dog to act on its own "to protect the handler," should not operate to exonerate them from constitutional liability. Good intentions does not salvage an otherwise

unreasonable use of force. In *Graham v. Connor*, 490 U.S. 386 (1989), this Court held:

> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. [citations omitted] An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's *good intentions* make an objectively unreasonable use of force constitutional.
>
> *Graham, supra*, 490 U.S. at 397 (emphasis added).

What *Graham* forbids -- relying upon the police subjective good faith to excuse otherwise unreasonable behavior -- applies here. The key facts are, was it objectively reasonable to train a police dog to act on its own and attack two school girls as they lay on the ground? That the answer to the question may be in petitioners' favor is no reason to believe they cannot be right. Sometimes, a plaintiff is entitled to summary judgment in an excessive force case. *See, e.g., Garner v. Memphis Police Dept.*, 8 F.3d 358, 363-64 (6th Cir. 1993) (Sixth Circuit holds that police department is liable as a matter of law for an officer's use of excessive force).

3. This Court Should Grant Review To Decide The Extent Of Municipal Liability Under The "Danger Creation" Exception Recognized By This Court In *DeShaney v. Winnebago County, Dep't of Soc. Servs.*

Generally, a person has no right to sue state actors because they fail to protect the person from harm inflicted by those who are not state actors. *DeShaney v. Winnebago County, Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989). However, as implied by *DeShaney* and recognized by many courts of appeal, there are exceptions. Where state actors create a special relationship by, for example, taking a person into custody, or where state actors affirmatively create a danger that places a person in peril, under the due process clause a person may sue for deprivation of her liberty interest. *E.g., L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992).

Petitioners' danger creation claim was in the alternative. If there was no Fourth Amendment seizure, then they could sue for Burlingame's creation of a danger which injured petitioners. Burlingame created the danger by training the dog to attack without command upon the *dog's* determination that an attack is necessary to protect the handler from imaginary harm. Petitioners should be allowed to sue -- they could not protect themselves from this danger as they were being held at gunpoint. Burlingame's training, as applied here, caused an infringement of petitioners' liberty interest protected under the due process clause:

> As a general rule, members of the public have no constitutional right to sue state employees who fail to protect them against harm inflicted by third parties. [citations omitted]
>
> This general rule is modified by two exceptions: (1) the "special relationship" exception; and (2) the "danger creation"

exception. Although some cases have blended the two exceptions together, *see, e.g., Ketchum*, 811 F.2d at 1247, the distinction is important.

After the state has created a special relationship with a person, as in the case of custody or involuntary hospitalization, cases have imposed liability under a due process theory, premised on an abuse of that special relationship. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 314-325, 102 S.Ct. 2452, 2457-2463, 73 L.Ed.2d 28 (1982), (patient in custodial facility for the mentally retarded denied protection from violence); *Estelle v. Gamble*, 429 U.S. 97, 103-104, 97 S.Ct. 285, 290-291, 50 L.Ed.2d 251 (1976), (prisoner denied Eighth Amendment right to medical care).

The "danger creation" basis for a claim, by contrast, necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger. *See Wood v. Ostrander*, 879 F.2d 583, 588-90 (9th Cir.1989)(plaintiff not in custody but state officer created the danger), *cert. denied*, -- U.S. --, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990); *cf. DeShaney*, 489 U.S. at 201, 109 S.Ct. at 1006 (plaintiff not in custody and state officer did not create the danger). *DeShaney* did not rule that custody was required where the state affirmatively causes the harm. In addition to pointing out that Joshua DeShaney was not in state custody when injured, the Court noted that "(w)hile the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creations, nor did it do anything to render him any more vulnerable to them.*" *DeShaney*, 489 U.S. at 201, 109 S.Ct. at

> 1006. (emphasis added). *DeShaney* thus suggests that had the state created the danger, Joshua might have recovered even though he was not in custody. *L.W. v. Grubbs*, *supra*, 974 F.2d at 121.

In *Grubbs*, the Ninth Circuit held that the plaintiff, a state-employed nurse, could sue her supervisors under 42 U.S.C. § 1983 because they knowingly placed her alone with the inmate who had a history of violent sexual offenses, and against whom plaintiff, defendants knew, could not defend herself. "The Defendants . . . used their authority as state correctional officers to create an opportunity for Blehm [the inmate] to assault [plaintiff] that would not otherwise have existed." The *Grubbs* panel pointed out the plaintiff was "not seeking to hold Defendants liable for Blehm's violent proclivities." "Rather, [plaintiff] seeks to make Defendants answer for their acts that independently created the opportunity for and facilitated Blehm's assault on her." 974 F.2d at 121, 122.

Petitioners should have the same rights as the plaintiffs in *Grubbs* and *Horton v. Flenory*, 889 F.2d 454, 458 (3rd Cir. 1989) (police department, pursuant to policy, placed arrestee in custody of private person who killed him; court holds department liable for placing decedent in danger of injury). By training its dogs to attack and bite upon the dog's determination that an attack is necessary, Burlingame created the danger of the dog attack in this case. Petitioners were powerless, and defendants knew it.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
Attorneys for Petitioners

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 94-15794
D.C. No. CV-93-0453-MPH
MEMORANDUM*

JACKELINE MARQUEZ; ROCIO ANDRADE,

Plaintiffs-Appellants

vs.

FILED
MAR 13 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MIGUEL A. ANDRADE,

Plaintiff,

and

CITY OF BURLINGAME; ALFRED J. PALMER, Chief of Police, and RICHARD HARMAN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Marilyn Hall Patel, District Judge, Presiding

Submitted** September 15, 1995
San Francisco, California

Before: KOZINSKI and HAWKINS, Circuit Judges, and SILVER***, District Judge

Plaintiffs were attacked and bitten by a police dog during an investigatory stop. They filed suit pursuant to 42 U.S.C. § 1983, claiming that conduct on the part of Officer Richard Harman and the city of Burlingame police department constituted an unreasonable seizure in violation of the Fourth Amendment and a deprivation of personal security guaranteed under Fourteenth Amendment substantive due process principles. The district court granted summary judgment to the defendants. Plaintiffs appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

I. Fourth Amendment

The first issue is whether defendants' conduct constituted an unreasonable seizure in violation of the Fourth Amendment. The Supreme Court of the United States has defined seizure as "an intentional acquisition of physical control." Brower v. County of Inyo, 489 U.S. 593, 596 (1989). Brower clarified the type of police action that constitutes a seizure when the police initiate contact with an

---

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

*** Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

individual. In the present case Officer Harman clearly had seized the plaintiffs prior to the dog's attack.

Fourth Amendment claims of unreasonable seizure also require courts to evaluate any force used after the initial contact and throughout "the course of an...investigatory stop." Graham v. Connor, 490 U.S. 386, 395 (1989). The parties do not dispute that, like the initial police conduct, subsequent police conduct constitutes a seizure under the Fourth Amendment only if the conduct was intentionally committed by law enforcement officers.

We conclude that the dog bites were not seizures because the attack did not involve the requisite intentional conduct. The parties agree that Officer Harman did not intend to use the police dog to "subdue" the plaintiffs. Harman did not order the dog to find or attack the plaintiffs. He was not aware that the dog had left the car until he heard one of the girls scream.

The plaintiffs argue that the City of Burlingame and its police chief intended the dog attack because the City trains police dogs to attack when the dogs sense that a police officer is endangered. The cases plaintiffs cite do not support their contention that this training program supplies the element of intent necessary to find a seizure under the Fourth Amendment. In both Mendoza v. Block, 27 F.3d 1357, 1358-59 (9th Cir. 1994) and Chew v. Gates, 27 F.3d 1432, 1436 (9th Cir. 1994), cert. denied, 115 S.Ct. 1097 (1995), cited by the plaintiffs, one or more police officers had released a canine to search and "subdue"suspects. Because the police officers consciously chose to employ the dogs to seize the suspects, the element of intent existed in both cases.

In another case cited by plaintiffs, the Supreme Court concluded that, in some circumstances, cities can be liable under 42 U.S.C. § 1983 for failure to train officers. See City of Canton v. Harris, 489 U.S. 378, 388 (1989). In cases

alleging failure to train, however, the plaintiffs must establish the elements of the underlying constitutional violation. See City of Canton, 489 U.S. at 388 n.8. City of Canton does not indicate that a training program, or a failure to train, supplies the intent element necessary to find a seizure under the Fourth Amendment.

Plaintiffs have failed to show that either the City of Burlingame or Officer Harman

intentionally employed the dogs during the investigative stop. Therefore, the attack is not a "seizure" under the Fourth Amendment.

II. Fourteenth Amendment

Plaintiffs also argue defendants' conduct violated substantive due process. The Supreme court held in Graham, however, that a claim of abusive government conduct that implicates a specific constitutional right must be analyzed as a violation of that right, rather than substantive due process. 490 U.S. at 395; Sinaloa Lake Owner's Ass'n v. City of Simi Valley, 882 F.2d 1398, 1408-09 n.10 (9th Cir. 1989), cert. denied, 494 U.S. 1016 (1990). The substantive due process argument here is that (1) defendants created a danger to plaintiffs by (a) training police dogs to attack when they perceive a threat to a police officer, and (b) arresting plaintiffs; and (2) the danger was realized when, during the course of the arrest, the dog bit plaintiffs. See Appellants' Opening Brief at 18-20. The government conduct on which this claim is based implicates the Fourth Amendment's prohibition against unreasonable seizures and must therefore be analyzed, not under substantive due process, but under the Fourth Amendment. As we have already concluded, however, defendants' conduct did not constitute an unreasonable seizure.

The award of summary judgment is AFFIRMED.

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-15794
D.C. No. CV-93-00453 MHP

ORDER

JACKELINE MARQUEZ; ROCIO ANDRADE,

Plaintiffs-Appellants

vs.

FILED
APR 30 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MIGUEL A. ANDRADE,

Plaintiff,

and

CITY OF BURLINGAME; ALFRED J. PALMER, Chief of Police, and RICHARD HARMAN,

Defendants-Appellees.

Before: KOZINSKI and HAWKINS, Circuit Judges, and SILVER*, District Judge.

The panel has voted to deny the petition for rehearing. The full court has been advised of the suggestion fo

---

* Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

rehearing en banc and no active judge has requested a vote thereon. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MIGUEL ANGEL ANDRADE, et al.,	)
	) No. C93-0453
Plaintiffs,	) MPH
	) OPINION
vs.	)
	)
CITY OF BURLINGAME, et al.,	)
	)
Defendants.	)
	)

PATEL, District Judge.

Plaintiffs Miguel Andrade, Rocio Andrade, Maribel Andrade and Jackie Marquez brought this action against defendants City of Burlingame, Burlingame Police Chief Alfred Palmer, and Police Officer Richard Harman, alleging violations of their civil rights under 42 U.S.C. § 1983 as well as several state law causes of action. Now before this court is defendants' motion for summary judgment on all counts.[1]

---

1 All of the plaintiffs except Miguel Andrade are minors. At this court's direction, guardians ad litem have now been appointed for the minor plaintiffs. Maria Marquez has been appointed guardian ad litem for Jackie Marquez, her daughter. Francisca Andrade has been appointed guardian ad litem for Rocio and Maribel Andrade, her children.

BACKGROUND[2]

On February 6, 1992, Officer Harman of the Burlingame Police Department was patrolling the streets of Burlingame in his patrol car. He was accompanied by his police dog, with whom he had worked since 1988. Some time between 3:30 and 4:00 p.m., Officer Harman received a call from the police dispatcher informing him that a bus passenger had been assaulted with a baseball bat and that the suspects had fled the scene. The dispatcher provided Officer Harman with a description of the suspects and of the suspects' car and informed him that the suspects were believed to be armed with baseball bats and a pellet gun.

Officer Harman saw a car that fit the description of the suspects' vehicle and pulled the car over. The car was driven by Miguel Andrade. Rocio Andrade, Maribel Andrade and Jackie Marquez were passengers in the car.[3] Officer Harman called for back-up units after the car was stopped. Defendants claim that Officer Harman then ordered the driver from the car; plaintiffs claim that they understood that they were all to get out of the car. The parties agree that when Miguel Andrade got out, he failed to comply immediately with Officer Harman's command to lie down on the ground. Officer Harman then approached Miguel Andrade, and as he

---

2 The following statement of facts is taken from the parties' Joint Statement of Undisputed Material Facts ("Joint Statement"), except as otherwise indicated.

3 There was apparently a fifth passenger in the car, Javier Chavarria. *See* Declaration of Heidi Rand, Ex. F. (Chavarria Deposition) at 19-20. Mr. Chavarria is not a plaintiff in this action.

did so the other plaintiffs got out of the car.

The police dog was in the back seat of the patrol car when Officer Harman stopped the plaintiffs. A window divided the front compartment of the car from the rear compartment where the dog was; Officer Harman had left this window partially open in order to give the dog fresh air. *See* Declaration of Richard Harman in Support of Summary Judgement ¶ 7. Officer Harman also left the front door of the patrol car open when he got out of the car to approach Miguel Andrade. While Officer Harman was trying to subdue Miguel Andrade, the dog apparently climbed through the divider and out the open front door. The parties agree that Officer Harman did not order the do g to do so, and that he did not know that the dog had left the vehicle. The dog proceeded to bite the heads of Rocio Andrade and Jackie Marquez, again without being so ordered by Officer Harman. Officer Harman called the dog off as soon as he became aware that it had bitten the girls.

Shortly thereafter, it became clear that the Andrade party was not in fact the group that had assaulted the bus passenger. The plaintiffs were released and the girls received immediate medical attention. According to plaintiffs, the dog bites to Jackie Marquez's head caused her discomfort for a few weeks, and she continues to be afraid of both dogs and police officers. *See* Declaration of Heidi Rand, Ex. D (Marquez Deposition) at 8-10. Rocio Andrade apparently required stitches in her head and has on at least one occasion seen a psychiatrist regarding the incident. *See* Rand Decl., Ex. G (Rocio Andrade Deposition) at 35-37, 39. Plaintiffs subsequently filed this action seeking compensatory and punitive damages.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted:

> against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial...since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The moving party bears the initial burden of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. The burden then shifts to the nonmoving party to "go beyond the pleadings, and by [its] own affidavits, or by the 'depositions, answers to interrogatories, or admission on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553 (citations omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

The moving party does not surmount its initial burden through conclusory allegations as to the state of the material on file; however, it is not required to "support its motion with affidavits or other similar material *negating* the opponent's

claim." *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553. (emphasis in original). The moving party discharges its burden by showing that the nonmoving party has not disclosed the existence of any "significant probative evidence tending to support the complaint." *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968).

The court's function on a motion for summary judgment is not to make credibility determinations. *Anderson*, 477 U.S. at 249, 106 S.Ct. at 2510. The inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *T.W. Elec. Serv.*, 809 F.2d at 631.

DISCUSSION

Plaintiffs state in their opposition papers that they have dismissed several of their causes of action. Their remaining federal cause of action is for violations of their fourth and fourteenth amendment rights pursuant to 42 U.S.C. § 1983.[4] Plaintiffs have also alleged pendent state law

---

4 Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

A claim under section 1983 requires proof of

claims for assault and battery, intentional and negligent infliction of emotional distress, and for negligent training, retention, supervision, investigation and discipline.

I. *Fourth Amendment Violations*

A. *Appropriate Plaintiffs*

"Fourth Amendment rights are personal rights which...may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 966-67, 22 L.Ed.2d 176, *reh'g denied sub nom. Ivanov v. United States*, 394 U.S. 939, 89 S.Ct. 1177, 22 L.Ed.2d 475 (1969). The plaintiffs do not argue that the stop itself was improper under the fourth amendment or that the seizure would have been unconstitutional if the police dog had not escaped from the car.[5] Miguel and Maribel Andrade make no claim that they were attacked by the dog or that the seizure *as to them* was

---

two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged deprivation was committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 2254, 101 L.Ed.2d 40 (1988).

5 Officer Harman's conduct in stopping plaintiffs' car was proper, since the vehicle had been identified by an eyewitness as the one driven by the individuals who had beaten the bus passenger. *See* Joint Statement ¶¶ 1-5. *See generally Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968). The fact that plaintiffs apparently turned out not to be the fleeing felons does not vitiate probable cause, and plaintiffs do not so argue.

unreasonable in any way. Indeed, it is unclear from plaintiffs' papers whether or not these two plaintiffs are in fact pursuing this claim. To the extent that plaintiffs Miguel and Maribel Andrade are attempting to assert such a cause of action, the court finds that they are not proper plaintiffs.

B. *The Merits*

The fourth amendment protects against "unreasonable searches and seizures...." U.S. Const. amend. IV. In order to prove a fourth amendment violation, plaintiffs Rocio Andrade and Jackie Marquez must first establish that there has been a seizure. *See Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985). A "seizure" occurs when a government actor restrains the freedom of a citizen "by means of physical force or show of authority...." *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968); *see also Garner*, 471 U.S. at 7, 105 S.Ct. at 1699 (1985) ("[W]henever an officer restrains the freedom of a person to walk away, he has seized that person.").

In *Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989), the Supreme Court attempted to delineate the contours of the "seizure" requirement. In that case, the plaintiffs' decedent, Brower, was killed when he crashed into a police roadblock set up by police to capture him. The plaintiffs argued that the roadblock effected an unreasonable seizure of Brower, since its design caused him to crash into it, rather than allowing him to stop voluntarily. The Ninth Circuit held that no seizure had occurred because Brower could have stopped voluntarily at any point before he collided with the roadblock. *See Brower v. County of Inyo*, 817 F.2d 540, 546-47 (9th Cir. 1987). The Supreme Court reversed, holding that because the police had intended to stop

Brower's movements by means of the roadblock, and had so stopped him, a seizure had occurred. *See Brower*, 489 U.S. at 595-97, 109 S.Ct. at 1380-81.

Distinguishing the case from situations in which a fleeing felon unexpectedly loses control of his car and crashes, the Court explained that the fourth amendment "requires an intentional acquisition of physical control." *Id.* at 596, 109 S.Ct. at 1381. The Court noted that the fourth amendment would not be implicated in the case of an innocent passerby-or even a fleeing felon-who is accidentally pinned against a wall by an unoccupied police car that slips its brake:

> It is clear ... that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied.*

Id. at 596-97, 109 S.Ct. at 1381 (emphasis in original).

[1] In the instant case, it is undisputed that Officer Harman did not intend to use his police dog to subdue the plaintiffs. Indeed, the officer had already halted the plaintiffs' movement when the dog escaped from the car and bit Rocio Andrade and Jackie Marquez. The plaintiffs had already been seized. Plaintiffs attempt to argue that because the *dog* intended to bite the two girls, its actions were "intentional" and thus a seizure within the meaning of

Brower. The dog is not a defendant in this suit nor could it be. Nor is the dog a government actor. At other times in their papers, plaintiffs make a more appropriate analogy: that the dog was essentially one "weapon" in Officer Harman's arsenal. Because Officer Harman did not intend to seize plaintiffs by this means, however, there can be no fourth amendment violation. The key question is whether *Officer Harman* intended to seize plaintiffs by means of the dog and the answer is indisputably "no". *Cf. Kerr v. City of West Palm Beach*, 875 F.2d 1546 (11th cir. 1989) (plaintiffs allowed to bring action against police department for fourth amendment violations where police intentionally used dogs to apprehend them).[6]

Plaintiffs cite to cases in which accidental shootings by police officers have been analyzed as fourth amendment seizures. For instance, in *Leber v. Smith*, 773 F.2d 101 (6th Cir.1985), *cert. denied*, 475 U.S. 1084, 106 S.Ct. 1466, 89 L.Ed.2d 722 (1986), the plaintiff argued that a deputy who accidentally shot him while making a investigatory stop had "unreasonably seized" him in violation of the fourth amendment. Although the Sixth Circuit ultimately held that

---

6 Although plaintiffs' analogy of the dog to a loaded weapon may be useful, they attempt to extend it too far by citing to cases in which defendants have been found liable for setting up trap guns or other deadly devices on their premises to deter burglars. *See People v. Ceballos*, 12 Cal.3d 470, 476-78, 116 Cal.Rptr. 233, 526 P.2d 241 (1974) (reviewing cases). The fact that a particular action may be a common law tort does not mean that it is necessarily actionable as a constitutional violation. Without establishing that Officer Harman intended to seize plaintiffs by using the dog, plaintiffs cannot establish a fourth amendment violation.

the seizure was reasonable, it implicitly held that the shooting, although accidental, was indeed a seizure. *See also Patterson v. Fuller*, 654 F.Supp. 418, 427 (N.D.Ga.1987) (following *Leber*). Notably, these cases pre-dated the Supreme Court's *Brower* decision, in which the Court more thoroughly refined the level of intent required for a fourth amendment seizure. Moreover, in both of these cases, the suspect was seized *by the intended instrumentality*, although not in the exact manner intended. In both *Leber* and *Patterson*, the defendant officers had drawn their guns and were attempting to exert authority over the suspects through this show of force. *See Leber*, 773 F.2d at 102; *Patterson*, 654 F.Supp. at 419-20. As the Supreme Court noted in *Brower*.

> In determining whether the means that terminates the freedom of movements is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned.... We think it is enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.

Id. 489 U.S. at 598-99, 109 S.Ct. at 1382.

Whether or not the decisions in *Leber* and *Patterson* withstand the reasoning of *Brower*, it is clear that those cases are readily distinguishable from the instant one. It is not as if Officer Harman intended that the dog intimidate the plaintiffs into submission, or intended that the dog bite their pant's legs to prevent their escape. On the contrary, Officer

Harman never meant to use this particular "instrumentality" in any way to effect the seizure. The dog simply escaped from the patrol car after Officer Harman had already seized the plaintiffs.

Accordingly, defendants' motion for summary judgment on plaintiffs' fourth amendment claim is granted.

II. *Fourteenth Amendment Violations*

[2] Plaintiffs also claim that Officer Harman's actions violated their fourteenth amendment rights to personal security and to substantive due process.[7]

The Supreme Court has held that claims of excessive use of force during investigatory stops are properly analyzed under the fourth amendment, rather than under the fourteenth amendment. *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1870, 104 L.Ed.2d 443 (1989). While recognizing that lower courts had often applied a substantive due process test to claims of excessive force, the Court in *Graham* held that it was more appropriate to analyze such claims, at least in the context of investigatory stops, under the fourth amendment's explicit prohibition on unreasonable searches and seizures. *See id.* at 393-94, 109 S.Ct. at 1870.

The Ninth Circuit has subsequently read the reach of *Graham* broadly, holding that "excessive force claims arising before or during an arrest are to be analyzed exclusively under the fourth amendment's reasonableness standard rather

---

7 Once again, it is unclear whether only Rocio Andrade and Jackie Marquez are pursuing this claim, or whether Miguel and Maribel Andrade are asserting it as well. At any rate, the analysis which follows applies to all the plaintiffs.

than the substantive due process standard...." *Reed v. Hoy*, 909 F.2d 324, 329 (9th Cir. 1989), *cert. denied*,-U.S.-, 111 S.Ct. 2887, 115 L.Ed.2d 1053 (1991); *see also United States v. Reese*, 2 F.3d 870, 883 (9th Cir. 1993), *cert. denied*-U.S.-, 114 S.Ct. 928, 127 L.Ed.2d 220 (1994). Although plaintiffs do not directly characterize their fourteenth amendment claim as an excessive force claim, it is clear that it is in fact such a claim. The facts and theories that plaintiffs rely on to support their fourteenth amendment claim are identical to those they use to support their fourth amendment claim: namely that Officer Harman was negligent in allowing the dog to escape from the patrol car during the investigatory stop. This cause of action is therefore appropriately pleaded as a fourth amendment violation and must be dismissed for the reasons set forth above.[8]

---

8 Cases cited by plaintiffs that pre-date *Graham* are thus of limited utility. For instance, plaintiffs cite to *Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir.), *cert. denied*, 484 U.S. 935. 108 S.Ct. 311, 98 L.Ed.2d 269 (1987), in which the Ninth Circuit held that an estate could allege violations of a decedent's fourteenth amendment rights for excessive force by officers attempting to detain the decedent. *See id.* at 1417. In doing so, the Ninth Circuit relied upon the substantive due process test formulated by Judge Friendly in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom. Employee Officer John v. Johnson*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d. 324 (1973). *See Smith*, 818 F.2d at 1417. That reasoning was expressly disapproved by the Supreme Court in *Graham*. *See Graham*, 490 U.S. at 392-93, 109 S.Ct. at 1869-70.

The only post-*Graham* case cited by plaintiffs is *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). In that case, the Ninth Circuit held that a woman's allegations that a state

Even if this court were to analyze plaintiffs' claim under the fourteenth amendment, it is clear that no constitutional violation occurred. Negligent conduct is not sufficient to support a constitutional violation pursuant to 42 U.S.C. § 1983. *See Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986). In order to prove a claim under section 1983, a plaintiff must establish that the defendant acted with "deliberate indifference." *Wood v. Ostrander*, 879 F.2d 583, 587-88 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d. 305 (1990).[9] In *Ostrander*, the Ninth Circuit held that there was

---

trooper acted with deliberate indifference by impounding her car and then leaving her alone in a high crime area were sufficient to state a claim under section 1983 for violations of her fourteenth amendment rights. *See id.* at 588. The more generalized holding of *Ostrander*-that a governmental actor acting with deliberate indifference may violate a person's substantive due process rights-does not affect *Graham's* specific holding-that such actions taken in the context of a seizure are to be analyzed under the fourth amendment.

9 The Supreme Court has expressly reserved the question of what level of fault is necessary to establish a constitutional violation under section 1983. *See City of Canton v. Harris*, 489 U.S. 378, 388 n. 8, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412 (1989). The Court has held, however, that the "deliberate indifference" standard is the appropriate level of fault in cases in which a plaintiff sues a municipality for failure to train its employees. *See id.* at 388, 109 S.Ct. at 1204. The Ninth Circuit in *Ostrander* held that this same standard is applicable to underlying claims of constitutional violations. *See Wood*, 879 F.2d at 587-88; *see also Redman v. County of San Diego*, 942 F.2d 1435, 1441, 1443 (9th Cir.1991), *cert. denied*-U.S.-, 112 S.Ct. 972, 117 L.Ed.2d 137

a triable issue of fact as to whether an arresting officer who impounded a woman's car and then left her alone at night in a high-crime area had shown deliberate indifference to her safety. *See id.* at 589.

The undisputed facts of this case clearly show that Officer Harman's actions did not rise to this level of culpability. Officer Harman believed he was confronting a group of suspects who were armed with baseball bats and a pellet gun and who had just beaten a bus passenger. *See* Joint Statement ¶ 5. Furthermore, the suspects, by their own admission were not fully complying with his orders. *See id.* ¶ 14. Officer Harman was forced into a situation in which he reasonably believed that he had to act quickly. In doing so he unintentionally left open the means by which the dog could escape from the car and attempt to subdue the plaintiffs. Once he realized that the dog had bitten the two girls, he immediately called the dog off and escorted it back to the car. After the scene had been secured, he called for medical assistance. *See* Harman Decl. ¶ 11.

There is some evidence that Officer Harman's dog had been trained to act on it's own, without orders from the officer, in certain situations in which it perceived danger to the officer. *See, e.g.*, Rand Decl. Ex. A (Harman Deposition) at 44-46; *id.* Ex.I (O'Brien Deposition) at 35. This fact alone, however, cannot support a finding of "deliberate indifference." Officer Harman had worked with the dog for over three years and had never known it to attack without a command from an officer. Joint Statement ¶ 23. Indeed, the dog had never previously left Officer Harman's car without being instructed to do so. *Id.* ¶ 22. In view of all the

---

(1992).

circumstances, including the undisputed lack of intent by Officer Harman and the dog's history of non-aggression, plaintiffs cannot establish that the officer acted with deliberate indifference to their safety.

III. *Liability of Chief Palmer and the City*

In *Monell v. Department of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court held that municipalities and local governments are "persons" for purposes of 42 U.S.C. § 1983 and may be held liable for violations of individuals' constitutional rights. *Id.* at 690, 98 S.Ct. at 2035. However, liability under section 1983 may not be imposed on a theory of *respondeat superior*. *Id.* at 693-95, 98 S.Ct. at 2037-38. Rather, a municipality may only be held liable when "execution of a government's policy of custom... inflicts the injury...." *Id.* at 694, 98 S.Ct. at 2037-38. Plaintiffs argue that Chief of Police Palmer and the City of Burlingame are liable under this theory through their deliberate indifference to their officers' excessive use of force.

A. *The City's Liability For Its Employees' Constitutional Violations*

A municipality may be held responsible for constitutional violations inflicted by its employees if such actions are taken pursuant to the municipality's customs or policies. However, in order to impose liability on a municipality under this theory there must be some underlying constitutional violation. *See City of Los Angeles v. Heller*, 475 U.S. 796, 798-99, 106 S.Ct. 1571, 1572-73, 89 L.Ed.2d 806 (1986). In *Heller*, the Supreme Court held that in an action for damages for unreasonable use of force, "neither

[*Monell*] ... nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact ... the officer inflicted no constitutional harm." *Id.* at 799, 106 S.Ct at 1573. Because this court has ruled that Officer Harman did not violate plaintiffs' fourth or fourteenth amendment rights, plaintiffs' attempt to impose liability on the City on the basis of his actions must also fail.

B. *The City's Liability For Its Own Constitutional Violations*

In certain circumstances, a municipality may also be held liable under section 1983 even if no individual employee can be held liable. For instance, in *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), the Supreme Court held that liability could be imposed upon a city for failing to train its police department as to when a detainee required medical care, although in that case a jury had already found that the employees themselves did not violate the plaintiff's constitutional rights. *See id.* at 382, 388, 109 S.Ct. at 1201, 1204. The Court held that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388, 109 S.Ct. at 1204; *see also Sanders v. Kennedy*, 794 F.2d 478, 483 (9th Cir. 1986) (police department's hiring and retention of officers "predisposed to violate [plaintiffs'] constitutional rights" can show deliberate indifference sufficient to impose liability).

As an initial matter, it does not appear that plaintiffs set forth this theory in their complaint, although they now argue some version of it in their papers. In their complaint,

plaintiffs allege that the City and Officer palmer are liable under section 1983 for being deliberately indifferent to an alleged practice of police officers to use excessive force against Hispanic-American citizens. Plaintiffs have since dismissed any equal protection claim.

At any rate, plaintiffs would be unable to hold the City or Chief Palmer directly liable for violating either plaintiffs' fourth or fourteenth amendment rights. Given the fourth amendment's requirement of "intent" for a seizure, it is questionable whether a municipality could ever be held directly liable for a "seizure." Rather, plaintiffs would first have to prove that a particular officer made an unconstitutional seizure and then prove that the city was legally responsible for that constitutional violation. *See, e.g., Heller*, 475 U.S. at 798-99, 106 S.Ct. at 1572-73. As discussed above, plaintiffs have made no showing that Officer Harman seized them unlawfully.

It is possible to hold a municipality liable under section 1983 for fourteenth amendment violations even where no individual employee is liable; however, such a claim is not available to plaintiffs on the undisputed evidence before the court in this case. The evidence submitted shows that the City had a detailed policy regarding the canine unit. *See* Rand Decl. Ex.K. Plaintiffs have pointed to no evidence to indicate that the City did not follow this policy, nor any evidence to show that the City had any history of problems with the unit.[10] The only evidence plaintiffs present

---

10 Plaintiffs contend that there is evidence to show that the dogs could act if the officer was in threat of being assaulted, *see* Rand Decl. Ex. I (O'Brien Deposition) at 35, and that this evidence is somehow in conflict with the written policy that

regarding the City's liability on this issue is that the dogs in the canine unit are trained to act on their own initiative in some instances (*i.e.*, if the officer is in danger). This fact alone cannot establish a policy or custom that violates plaintiffs' fourteenth amendment rights.[11]

There may be instances in which a city's canine unit

---

allows dogs to take offensive action "to guard against imminent loss of life or serious bodily injury." *See* Rand Decl., Ex. K at 6. The court fails to see the inconsistency between the policy and the evidence submitted.

Plaintiffs also claim that the fact that no formal reprimand of the dog or the officer was made indicates a policy or custom of deliberate indifference. In support of this argument, plaintiffs cite *McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir. 1986). In *McRorie*, however, the Ninth Circuit held only that "[p]olicy or custom may be inferred if, after the [incident], ... officials took no steps to reprimand or discharge the guards, *or if they otherwise failed to admit the guards' conduct was in error." Id.* (emphasis added). In the instant action, it is undisputed that the City and appropriate officials agree that the dog acted inappropriately. *See* Joint Statement ¶ 30.

11 In addition, as discussed above, the Supreme Court has made clear that claims for use of excessive force during investigatory stops must be analyzed under the fourth amendment, rather than the fourteenth amendment. *See Graham*, 490 U.S. at 395, 109 S.Ct. at 1871. The Court's analysis would also appear to apply to cases such as the instant one where plaintiffs attempt to hold a *City* liable for conduct of its police force during an investigatory stop.

puts citizens in such peril that the city's actions can be found to be violative of the fourteenth amendment, but the facts presented by plaintiffs do not support such a claim. Therefore, defendants' motion for summary judgment against Chief Palmer and the City of Burlingame is granted.

IV. *State Law Claims*

Because this court has determined that plaintiffs' federal claims are not viable, there is no federal claim left upon which to support supplemental jurisdiction over plaintiffs' state law claims. Accordingly, plaintiffs' state law claims are dismissed without prejudice for lack of jurisdiction.

CONCLUSION

The incident that occurred was undoubtedly unfortunate. However, not every unfortunate occurrence amounts to a legal wrong and not every legal wrong is actionable in federal court. For the foregoing reasons, defendants' motion for summary judgment as to plaintiffs' federal claims is **GRANTED** without prejudice to plaintiffs pursuing their state claims in state court. Plaintiffs will be given thirty (30) days from the date of this order in which to file this action in state court. The court deems that any applicable statutes of limitations were tolled during the pendency of this action and for the next thirty days.

IT IS SO ORDERED.

/s/

Marilyn Hall Patel